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IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 397. 295

INTERNATIONAL LIFE INSURANCE COMPANY, PETITIONER,

VS.

ADRIAN F. SHERMAN. RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI IN THE ABOVE ENTITLED CAUSE.

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Of counsel.

(28,752.)

IN THE

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OCTOBER TERM, 1921.

No. 797.

INTERNATIONAL LIFE INSURANCE COMPANY, PETITIONER,

VS.

ADRIAN F. SHERMAN, RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI IN THE ABOVE ENTITLED CAUSE.

We respectfully urge the court to deny this petition for the following reasons:

I.

(a) The federal question sought to be used as a basis for granting of this writ was not raised until petitioner filed a motion for rehearing in the Supreme Court of Missouri.

By the decisions of this court and the state court, this was too late.

Godchaux Co. Plff. In Error v. *Estopia,* 251 U. S. 179, 64 Law Ed. 213.

Anderson, Plff. in Error v. *Durr* (No. 27) decided Nov. 7, 1921.

Merganthaler Linotype Co. v. *Davis,* 251 U. S. 256, 64 L. Ed. 255.

(b) Likewise the law is laid down by the Supreme Court of Missouri that so-called constitutional questions must be raised at the first opportunity consistent with good pleading, and must be urged as every successive step thereafter in order to bring the question properly before the court for review.

LaVelle v. *Met. Life Ins. Co.,* 231 S. W. 616, l. c. 617.

Loymeyer v. *Cordage Co.,* 214 Mo. 689, 113 S. W. 1108.

Moliter v. *R. R.,* 180 Mo. App. 84 l. c. 92.

In *LaVelle* v. *Met. Life Ins. Co., supra,* the Missouri Supreme Court states the law as follows upon this point:

> "In *Loymeyer* v. *Cordage Co.,* 214 Mo. loc. cit. 689, 690, 113 S. W. 1108, 1110, Judge Lamm very clearly and forcefully stated the law, in respect to the matter under consideration, as follows:
>
> > 'But it must be taken as settled law that in so grave a matter as a constitutional question it should be lodged in the case at the earliest moment that good pleading and orderly procedure will admit under the circumstances of the given case; otherwise it will be waived.'

In *George* v. *Railroad*, 249 Mo. loc. cit. 199, 155 S. W. loc. cit. 454, Judge Graves discusses this question from a common sense viewpoint, as follows:

> 'If a law is plainly relied upon by the plaintiff, as here, and defendant desires to challenge that law upon constitutional grounds, it should be done at the earliest practical moment, and in addition a finger should be placed upon the provisions of the Constitution violated. This has been so long and well ruled that the mere mention of the ruling should suffice.' "

By reference to the brief of appellant in the Supreme Court of Missouri it will be noted that nowhere is there any claim of a denial of petitoner's constitutional rights. Under the law of Missouri it was imperatively necessary that such a question be specifically called to the appellate court's attention in appellant's brief. We doubt if the so-called constitutional or federal question was sufficiently raised in the answer filed in the court of *nisi prius*, but certainly it was not presented to the Supreme Court of Missouri by brief. In the late case of *State ex rel Crow* v. *Carothers*, 214 S. W. 857, the law upon this point is expressed in Syllabus 2 as follows:

> 2. Appeal and Error—719 (1), 1078 (1)—Constitutional question not presented in brief waived.
>
> Under Rev. St. 1909, Sec. 2080, and Supreme Court Rule 15 (198 S. W. VI.), constitutional question raised below *held* waived on appeal by appellant's failure to present question in his *brief, points and authorities, or assignment of errors.*"

In complete accord with this doctrine this court in *Hiawassee River P. Co.* v. *Carolina Tennessee P. Co.*, 252 U.

S. 341 l. c. 342, speaking for the court Mr. Justice Brandeis says:

> "If a general statement that the ruling of the state court was against the 14th Amendment were sufficient specification of the claim of a right under the Constitution to give this court jurisdiction (See *Clarke* v. *McDade*, 165 U. S. 168, 172, 41 L. Ed. 673 674, 17 Sup. Ct. Rep. 284; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 248, 46 L. Ed. 171, 176, 22 Sup. Ct. Rep. 120; *Marvin* v. *Trout*, 199 U. S. 212, 217, 224, 50 L. Ed. 157, 159, 161, 26 Sup Ct. Rep. 31) still the basis for a review by this court is wholly lacking here. For the 14th Amendment was mentioned only in the trial court. In the Supreme Court of the state no mention was made of it in the assignment of errors; nor was it, so far as appears by the record, otherwise presented to or passed upon by the court. The denial of the claim was specifically set forth in the petition for the writ of error to this court and in the assignment of erors filed here. But obviously that was too late. *Chicago, I & L. R. Co.* v. *McGuire*, 196 U. S. 128, 132, 49 L. Ed. 413, 417, 25 Sup. Ct. Rep. 200. The omission to set it up properly in the Supreme Court of the state was not cured by the allowance of the writ of error by its chief justice. *Appleby* v. *Buffalo*, 221 U. S. 524, 529, 55 L. Ed. 838, 840, 31 Sup. Ct. Rep. 699; *Hurlbert* v. *Chicago*, 202 U. S. 275, 280, 50 L. Ed. 1026, 1028, 26 Sup. Ct. Rep. 617; *Marvin* v. *Trout*, 199 U. S. 212, 223, 50 L. Ed. 157, 161, 26 Sup. Ct. Rep. 31."

In order that there may be no possibility of a claim that the federal question or so-called constitutional question was presented in this case to the Supreme Court of Missouri, we herewith copy "Assignments of Error" and "Points and Authorities" set out in appellant's brief before the Supreme Court of Missouri. We set this out verbatim, except for sake of brevity we leave off the citation of authorities, since

we are merely showing the court that these so-called constitutional questions were not presented to the Supreme Court of Missouri:

"Assignments of Error.

I.

The court erred in not sustaining defendant's demurrer to the evidence.

II.

The court erred in not holding that the decree in the case of Wagstaff against the Great Western Life Insurance Company bound the plaintiff in this case and his assignors, and the court erred in not holding that said decree was a complete defense to defendant in this case.

III.

The court erred in not holding that the plaintiff was estopped from denying that he was bound by the decree in the case of Wagstaff against the Great Western Life Insurance Company.

IV.

The court erred in not holding that the assignors of plaintiff were bound by the decree in the case of Wagstaff against the Great Western Life Insurance Company and that said assignors had no right or cause of action to transfer by assignment.

V.

The court erred in not holding that the alleged cause of action sued on in this case was barred by the statute of limitations.

VI.

The court erred in not holding that there was no proper assignment of the certificate to the plaintiff.

VII.

The court erred in rendering judgment on each of the counts for an improper and undeterminable amount.

VIII.

The court erred in entering judgment on counts 35, 41, 70, 71, 72, 45, 63, 46, 60, 8, 9, 10, 11 and 12.

IX.

The court erred in entering judgment on counts 209, 205, 210, 212, 214.

X.

The court erred in refusing to declare the law as requested by defendant in its declaration of law No. 1.

XI.

The court erred in refusing to declare the law as requested by defendants in its declaration of law No. 2.

XII.

The court erred in refusing to declare the law as requested by defendant in its declaration of law No. 3.

XIII.

The court erred in refusing to declare the law as requested by defendant in its declaration of law No. 4.

XIV.

The court erred in refusing to declare the law as requested by the defendant in its declaration of law No. 5.

XV.

The court erred in not finding for the defendant."

Points and Authorities.

I.

This being a suit for money had and received, same cannot be maintained by the plaintiff, and the court erred in not sustaining defendant's demurrer.

* * * * * * * *

II.

The annuity certificate holders, including plaintiff and his assignors, were in court and bound by the decree in the case of Wagstaff vs. Great Western Life Insurance Company, (a) as a matter of actual representation;

(b) because of community fund; (c) by class representation, and the court erred in not so holding.

* * * * * * * *

III.

The demurrer to the petition and the demurrer to the plaintiff's evidence should have been sustained for the reason that the petition does not state any cause of action and the evidence does not disclose any cause of action against the defendant, and the court erred in not so ruling.

* * * * * * * *

IV.

ESTOPPEL: Plaintiff is estopped to deny that he is bound by the decree of the United States Court in the Wagstaff case, and the court erred in not so holding.

* * * * * * * *

V.

The original annuity certificate holders, the assignors of plaintiff, having had notice of the proceedings in the Federal Court in the Wagstaff case, are bound thereby, and had no right or cause of action to transfer by assignment, and the court erred in not so holding.

* * * * * * * *

Presumptively notices mailed them at their addresses reached them.

* * * * * * * *

VI.

The statute of limitations—the alleged cause of action sued on in this case—is barred by the statute of limitations, and the court erred in not so holding.

* * * * * * * *

VII.

The judgment in favor of the plaintiff cannot stand because no proper assignment of the certificates to plaintiff was shown.

* * * * * * * *

VIII.

In no event was plaintiff entitled to any judgment in this case on Counts 8, 9, 10, 11 and 12, and the court erred in not so holding, and erred in entering judgment on said counts.

IX.

The judgment of the court in this case is erroneous for the further reason that it is for an improper and undeterminable amount on each of the counts.

X.

The court erred in any event in entering judgment on the following counts: 35, 41, 70, 71, 72, 45, 63, 46, 50, 8, 10, and 12, for the reason that the holders of the original certificates thereof consented in writing to the certificates being amended to provide that any payment thereunder should only be out of the earnings of the company.

XI.

The court in any event erred in entering judgment on counts 209, 205, 210, 212, 214, because from the testimony and evidence it appeared that the holders thereof had actual notice of the proceedings in court and the reorganization of the company and were bound by the decree of the court in the Wagstaff case.

XII.

The court erred in refusing to declare the law as requested by the defendant in its declaration of law No. 1 (Ab. Rec. p. 292).

XIII.

The court erred in refusing to declare the law as requested in defendant's declaration of law No. 2 (Ab. Rec. p. 292).

XIV.

The court erred in refusing to declare the law as requested in defendant's declaration by law No. 3 (Ab. Rec. p. 293).

XV.

The court erred in refusing to declare the law as requested by the defendant in its declaration of law No. 4 (Ab. Rec. p. 293).

XVI.

The court erred in refusing to declare the law as requested by the defendant in its declaration of law No. 5 (Ab. Rec. p. 293)."

In our suggestions in opposition to the granting of a motion for a rehearing in this case in the Supreme Court of Missouri we call the court's attention to the fact that none of these questions were properly raised by the appellant before the decision of the Supreme Court, and it is for this reason that the opinion of the Supreme Court does not deal with these so-called questions.

III.

There was no Federal question involved in this case.

We will not attempt a detailed recital of the facts in this case, but refer the court to the excellent statement of facts of the author of the opinion in the Missouri Supreme Court. It is complete and was not challenged by appellant, petitioner here, in their motion for rehearing in the Supreme Court of Missouri.

In 1907, stating that its purpose was to increase its business, the Great Western Life Insurance Company sold to the investing public what it termed annuity certificates. Certificates sold for $150.00 a share, and were issued in large amounts, something like $330,000.00 were issued and sold to the investing public of the southwest. This insurance

company was a "high finance" organization and was organized by a promoter by the name of VanLaningham. Judge McPherson in his picturesque and frank way speaks of Van Laningham and the issuance of these certificates as follows (R. 146):

> "Van Laningham seems to be a man of great push and energy, and full of devices, but if there is anything else that can be said in his favor, it has escaped my attention, and the ordinary vocabulary would be exhausted to accurately present him for consideration. Nor, need I use language denunciatory or otherwise of the schemes hereinbefore briefly set forth. The 'Mississippi Bubble' and other schemes were fairly conservative, as compared with this. These annuity certificates, if carried out, would be a magnificent investment and there was nothing wrong in their purchase."

With the money raised from the investing public on these annuity certificates the company wrote a large volume of business, but on account of the evils of over promotion and high-finance the company was involved in financial difficulties, and in the spring of 1908 certain dissatisfied stockholders and annuity certificate holders (not including the annuity certificate holders represented in this action) filed a suit in the United States District Court at Kansas City alleging mismanagement and other causes for equitable relief, and asked that a receiver be appointed. A receiver was appointed and "the court after receiving the reports of experts on the condition of the company, ordered a sale of the assets of the company. Certain persons interested in the company, believing the assets of the company would be sacrificed at a sale, presented a proposition to the court to pay off certain liabilities and to take the company out of the hands of a receiver and

proceed in the insurance business. The court made an order that if an amount in cash amounting to about $130,000.00 was raised to take care of certain pressing liabilities, he would discharge the receiver and turn the company back to its officers. The amount specified by the court was raised, and the receiver was discharged and the Great Western Life Insurance Company proceeded in the life insurance business until taken over by petitioner, The International Life Insurance Company.

In the order of Judge McPherson turning the company back to its owners and discharging the receiver he directed that unless the annuity certificate holders, who had not assented to the plan referred to above, came in within twenty days from August 27th, 1908, and accepted the plan, they would be forever barred. There was nothing possessing even the semblance of a sale of the assets of this corporation, nor did the court grant any equitable relief prayed for in the suit.

The trial court sitting as a jury held that the holders of the annuity certificates, plaintiffs in this case, respondents here, were not in court and were in nowise a party to these proceedings in the Federal Court. The Supreme Court *in banc* upheld this finding of the trial court.

The question of whether or not the plaintiffs in this case were parties to the case in the Federal Court was a *question of fact*. This court will not review questions of fact settled by the state court. Questions of fact decided by state courts are not open to review here by certiorari or writ of error:

Dower v. *Richards*, 151 U. S. 658.
Egan v. *Hart*, 165 U. S. 188.
Gardner v. *Bonesteel*, 180 U. S. 362.

Bement v. *Harrow Co.*, 186 U. S. 70.
Thayer v. *Spratt*, 189 U. S. 346.
German Savings Society v. *Dormitzer*, 192 U. S. 125.
Adams v. *Church*, 193 U. S. 510.
Clipper Mining Co. v. *Eli Mining Co.*, 194 U. S. l. c. 322.
Chrisman v. *Miller*, 197 U. S. 313.
Waters-Pierce Oil Co. v. *Texas*, 212 U. S. 86.

Before a merger of an insurance company is permitted in Missouri by law, the merger must be approved by three insurance superintendents, one from the State of Missouri, the other two to be chosen from two other states. This commission was composed of Frank Blake, Superintendent of Insurance of Missouri, Ike S. Lewis, Superintendent of Insurance for the State of Kansas, and B. L. Gill, Commissioner of Insurance and Banking of the State of Texas (R. 110). These various annuity certificate holders, respondents here, protested against the merger of the Great Western Life Insurance Company with the International Life Insurance Company, and with reference to the claims of these annuity certificate holders the following stipulation was included by *agreement of parties* in the Articles of Consolidation finally approved by the commissioners (R. 117).

> "In order to preserve all the rights, if any, of the holders of annuity and investment certificates heretofore issued by The Great Western Life Insurance Company and allow them all of the dividends or payments to which they might be entitled under such certificates in the event The Great Western Life Ins. Co. should have continued in the life insurance business for the full term provided in such certificates and to pay any amounts already due thereon, the International Life Insurance Co. for itself

and its successors, *hereby agrees* that as to the said certificates *one suit may be brought in the courts of Missouri for such an amount as would give the Supreme Court jurisdiction thereof on appeal, and the final judgment in such suit shall be binding upon the International Life Insurance Company and its successors for all the certificates of the class or classes adjudicated in said suit, and in the event that the final decision in said suit shall be that the annuity and investment certificates issued by The Great Western Life Insurance Company are valid and subsisting contracts and obligations against that company, then the said International Life Insurance Company agrees that it will pay to the holders or owners of such certificates, the amount paid as the purchase price of such certificates."*

We make the further contention that in *agreeing* to this order as above set forth, the petitioner for this writ *voluntarily waived* any right of proceeding further than the decision of the Supreme Court of Missouri. The suit filed was such as contemplated when this order was made. A decision was rendered by the Supreme Court *in banc* holding plaintiff entitled to recover, and we feel we are within the proprieties in saying that an end should be had to the delay and plaintiffs should be entitled to the rewards of their victory. There can be nothing more plain than that these annuity certificate holders were in no manner whatsoever parties to the receivership case in the Federal court, and their rights therefore were unaffected by any order of Judge McPherson made in that case. It was strongly urged by our opponents that these annuity certificate holders if not present in court and not parties to this proceeding and represented in it, they were present by what they term "class" or "virtual representation."

It was shown in evidence that great publicity was given to this hearing and by the files of newspapers introduced in support of this contention. It was also shown that notices were mailed out to the various annuity certificate holders scattered as they were over the entire southwest. But we undertake to say that no court will ever hold that a man will be denied his sacred right of a day in court by any claim of "class" or "virtual representation" when such a proceeding attempts to cancel the solemn rights of a contract, and moreover further attempts to compel the assumption of new and different contractural relations. Mr. Orr, a very able lawyer, an attorney for the re-organization committee so-called in the receivership case referring to these certificate holders said (Rec. 276):

> "They were all informed—NOT BY SUMMONS OR SUBPOENA, but they were informed as to what was going on etc."

Mr. Orr was a witness for the defense in this case and hostile to plaintiff's claim, but he himself makes admission that these annuity certificate holders who are opposing the granting of this petition were not in court BY SUMMONS OR SUBPOENA. No court has ever more jealously defended the principle of every man having his day in court than has this great court and there are many decisions where this doctrine is laid down. In the case of *Hovey* v. *Elliott*, 167 U. S. 407, 42 L. Ed. 215:

> "The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing what-

ever, is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence, to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends."

To the same effect is the case of *McVeigh* v. *United States*, 78 U. S. 11 Wall. 259 l. c. 267; *Windsor* v. *McVeigh*, 93 U. S. 277, l. c. 278; *Galpin* v. *Page*, 85 U. S. 18 Wall. 350, l. c. 368.

For all of the reasons heretofore mentioned, we respectfully urge the court to deny this petition.

Respectfully submitted,

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